

No. 76-323

Supreme Court, U. S.

FILED

DEC 2 1976

MICHAEL DOBAY, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

ALZALIA WINGATE AND TONI WINGATE, PETITIONERS

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
FREDERICK EISENBUD,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

ALZALIA WINGATE AND TONI WINGATE, PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 6a) is reported at 536 F. 2d 699. The opinion of the district court (Pet. App. 1a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1976. A petition for rehearing was denied on July 22, 1976. Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to September 20, 1976, and the petition was filed on September 2, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. Whether the warrant to search petitioners' safe deposit box for gambling paraphernalia or gambling receipts was based on probable cause.

2. Whether the failure to return money seized from petitioners' safe deposit box is a deprivation of property without due process.

STATEMENT

1. On October 6, 1975, Special Agent Grimsley of the Federal Bureau of Investigation presented an affidavit to a magistrate stating that James Wingate (who is the husband of petitioner Alzalia Wingate and the father of petitioner Toni Wingate) and others had conspired to commit, had committed, and were continuing to commit multiple violations of the Michigan Gambling Laws, in violation of 18 U.S.C. 1955 and 371 (C.A. App. a-32 to a-33).¹ The affidavit contained detailed information about James Wingate and his gambling operation; it recited that this information was provided by six different informants, all of proven reliability in the past.

One of the informants ("FBI-1") knew James Wingate for 15 years at the time the affidavit was submitted and knew at that time that his gambling operation consisted of at least six units, each of which was supervised by a "unit chief" or "field boss," who in turn supervised the eight to ten bookmakers who worked in each unit (C.A. App. a-34). James Wingate told FBI-1 that he was hoping to avoid detection by attempting to isolate himself from the day-to-day operation of his gambling combine. Wingate, FBI-1 said, met with his unit chiefs "on a weekly basis" to settle up on money collected (*id.* at a-35). This was corroborated by another informant, who told the affiant that James Wingate "is attempting to avoid involvement in the actual running of the combine" but that he "still makes most of the major

¹"C.A. App." refers to the appendix to appellants' brief in the court of appeals.

decisions for the combine and serves as the banker for the combine" (*id.* at a-46 to a-47). Other of the informants estimated that James Wingate's gambling operation "handled" between \$20,000 and \$25,000 per day (*id.* at a-34, a-44, a-49, a-52).

From this and other information contained in the affidavit, the affiant concluded that James Wingate was a "banker" who "makes all major decisions for the combine" (*id.* at a-58) and who must be able to "provide a ready supply of cash to pay large 'bets' sustained by the combine" (Affidavit, 24).² As a "banker," the affiant said, James Wingate must retain "large sums of money to finance the day to day operation of his combine." The affiant stated on his own knowledge from his experience in investigating gambling operations his belief that a person who serves as a "banker" retains large sums at his residence in order to limit access by employees such as unit chiefs and thereby reduce the risk of theft. Two of the informants told the affiant that they "believed" that James Wingate "keeps large sums of money to operate his combine at his residence at 18805 Capitol Street, Southfield, Michigan, and in safety-deposit boxes located at an unknown commercial bank" (*id.* at a-59).

On the basis of this affidavit, the magistrate issued a warrant on October 6, 1975, authorizing the search of the Wingate residence at 18805 Capitol Street for bookmaking records and gambling paraphernalia, including United States currency (*id.* at a-30).

2. On October 7, 1975, Agent Grimsley presented another affidavit to this same magistrate (Pet. App. 2a),

²The affiant also stated that, although James Wingate owned four automobiles valued at \$25,500 and a \$100,000 home, of which only \$50,000 was mortgaged, he knew of "no trade, profession, occupation or other employment in which [Wingate] is lawfully engaged" (C.A. App. a-59).

this time in support of an application for a warrant to search safe deposit box No. 127 in the Manufacturers National Bank of Detroit (Livernois-Lyndon Branch).³

Agent Grimsley advised the magistrate that a search of the Wingate residence conducted the day before had resulted in the seizure of \$3,000 in currency. During the course of the search, Grimsley stated, James Wingate "remarked to the investigating agents in substance that he did not keep gambling paraphernalia or gambling receipts at his residence; that he did have a safety deposit box, but that he did not keep the key on the premises at 18805 Capitol Street; [and] that the safety deposit box was at Manufacturers Bank—he did not disclose the location" (C.A. App. a-17).

During the search of the Wingate residence, the agents discovered a receipt for payment for a safe deposit box at Manufacturers National Bank of Detroit (Livernois-Lyndon Branch). Grimsley later learned that that box had been closed on March 18, 1974, "but that a new and larger box number 127, was opened on March 19, 1974," in the names of petitioners Alzalia and Toni Wingate. Grimsley made an effort to locate any other safe deposit box held by the bank on behalf of James Wingate but concluded that "[n]o other safety deposit boxes appear to be held by James Wingate" (*id.* at a-17 to a-18).

³Both courts below concluded that the magistrate properly considered both affidavits together in determining whether there was probable cause to issue the second warrant (Pet. App. 3a, 10a-11a). Petitioners do not challenge this conclusion. See *DiPiazza v. United States*, 415 F. 2d 99, 105 (C.A. 6), certiorari denied, 402 U.S. 949; *United States v. Nolan*, 413 F. 2d 850, 853 (C.A. 6); *United States v. Markis*, 352 F. 2d 860, 864 (C.A. 2), vacated and remanded on other grounds, 387 U.S. 425.

The magistrate thereafter issued a warrant authorizing a search of box number 127 for gambling records and illegally obtained gambling receipts (*id.* at a-12). The warrant was executed that same day, and \$500,200 in United States currency was seized.

3. On November 4, 1975, petitioners filed a motion for return of the money pursuant to Fed. R. Crim. P. 41(e). On December 4, 1975, a hearing was held by the district court. On January 16, 1976, that court issued an opinion and order denying the motion (Pet. App. 1a-5a). The court of appeals affirmed (Pet. App. 6a-12a; 536 F. 2d 699.⁴

ARGUMENT

1. Petitioners contend (Pet. 8) that the affidavit submitted in support of the application for a warrant on October 6, 1975, was deficient because it failed to specify that gambling activities were being conducted at their residence; that the search of their residence on October 6 was therefore unreasonable; that information pertaining to the two safe deposit boxes that was obtained during that search must therefore be suppressed; and, accordingly, that the property seized from the safe deposit box must be returned. But petitioners' claim fails from the start, for the affidavit plainly provided a sufficient basis for the issuance of the warrant on October 6. As detailed above (pp. 2-3, *supra*), the affidavit supporting the October 6 search warrant contained reliable and detailed information that James Wingate headed an extensive illegal numbers gambling operation;

⁴Although criminal charges were filed against James Wingate, they were dismissed on December 18, 1975. Accordingly, petitioners' motion was solely for return of property, the denial of which was final for purposes of appeal. *DiBella v. United States*, 369 U.S. 121, 131-132.

that he resided at 18805 Capitol Street; and that he probably retained at his residence large sums of money used in connection with the gambling operation. Applying a common sense standard, see *United States v. Ventresca*, 380 U.S. 102, 108, the magistrate had an abundance of evidence from which to conclude that there was probable cause to believe that James Wingate would, both for security reasons and to isolate himself from the gambling operation, use his home to store gambling records and the large sums of money necessary to sustain the operation. This ruling, turning on the facts of this case, does not warrant review by this Court.

2. Petitioners further contend (Pet. 8) that, even if the October 6 affidavit was sufficient to justify a search of the Wingate residence, there was no basis for concluding that the Wingate safe deposit box contained evidence of James Wingate's illegal gambling activity. But there was ample evidence to sustain the magistrate's finding. Reading the affidavits of October 6 and 7 together (see note 3, *supra*), the magistrate could reasonably conclude that James Wingate, as "banker" of an illegal numbers operation, needed access to large sums of money. While the search of his home did reveal \$3,000 in currency, James Wingate told the agents that he did not keep gambling receipts in his house. He further stated that he had a safe deposit box in the Manufacturers Bank. But no box other than the one in his wife's and daughter's names could be found in any of the various branches of the Manufacturers Bank. The magistrate was therefore fully justified in concluding that there was probable cause to believe that James Wingate had access to that box and that he kept the receipts from his illegal numbers operation in it.

3. Petitioners also advance the contention, raised for the first time in a petition for rehearing in the court

of appeals (see Pet. 7), that since "[t]he government has never made any claim, through any appropriate proceedings, to the \$500,200" (*id.* at 9), the failure to return the money constitutes a violation of due process. But an addendum to their petition shows that their factual premise is mistaken (see Pet. 10). On November 11, 1975, the Internal Revenue Service levied on monies and other property in possession of the Federal Bureau of Investigation belonging to either James Wingate or petitioner Alzalia Wingate. The amount of the levies are \$385,185.40 against James Wingate, and \$464,367.75 against Alzalia Wingate. These levies do not deprive petitioners of their due process rights. See *Phillips v. Commissioner*, 283 U.S. 589, 595, 596-597; cf. *Commissioner v. Shapiro*, 424 U.S. 614, 629-633; *Fuentes v. Shevin*, 407 U.S. 67, 91-92. The addendum states that the "underlying jeopardy assessments are being challenged by the attorneys who handled the Wingates' tax matters." Moreover, the tax court trial for the Wingate matter has been docketed for March 14, 1977. The seized money presumably will be disposed of as appropriate in light of the outcome of the tax litigation.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
FREDERICK EISENBUD,
Attorneys.

DECEMBER 1976.